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The Rise of Outsourcing in Modern Warfare : Sovereign Power, Private Military Actors, and the Constitutive Process

Winston P. Nagan

University of Florida Levin College of law, nagan@law.ufl.edu

Craig Hammer

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THE RISE OF OUTSOURCING IN MODERN WARFARE: SOVEREIGN POWER, PRIVATE MILITARY ACTORS, AND THE CONSTITUTIVE PROCESS

Winston P. Nagan and Craig Hammer

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THE RISE OF OUTSOURCING IN MODERN WARFARE: SOVEREIGN POWER, PRIVATE MILITARY ACTORS, AND THE CONSTITUTIVE PROCESS

Winston P. Nagan and Craig Hammer***

I. INTRODUCTION

Constitutions are continuous outcomes of power relations. The primary function of any constitution is to manage power, a critical feature of which is the prevention of destructive conflict. Warfare—including its facilitation by failure to pursue diplomatic avenues in some circumstances, and its promotion through the development of technological horrors such as nuclear weapons, mini-nukes, and other weapons of mass destruction—is the foremost challenge to the viability of an international constitutional system. The collapse of the League of Nations provided the world with a stark lesson in how aggression and warfare can undo a weak international constitutional regime dedicated to peace and security. Following World War II, the United Nations Charter established a new international constitutional system designed to more effectively facilitate cooperation among the major global powers to maintain peace and security. The proliferation of nuclear weapons constrained the Charter as superpowers jockeyed for positions of direct and indirect security influence. Warfare assumed new ideological perspectives, which were tied to claims for decolonization, self-determination, and independence. The Cold War introduced a volatile world order in which high intensity internal and ideological conflicts were fought by surrogates backed by hegemons.

The retreat of state absolutism has made room for the growth of civil society, now a central element of the emerging international constitutional order, and the effect on the constitutive process has been both positive and negative. The uneven distribution of power among clusters of interest groups has produced factions with constructive and destructive potential. On the one hand, humanity has produced the rule of law, democracy, and global public interest pressure groups, such as human rights organizations; on the other hand, it has created genocidal states, totalitarianism, and terrorism.

* Sam T. Dell Research Scholar Professor of Law, University of Florida, Levin College of Law; Affiliate Professor of Anthropology, University of Florida; Visiting Fellow, Brasenose College, Oxford; Honorary Professor, University of Cape Town, South Africa; Director, Institute for Human Rights, Peace and Development, University of Florida; Former Chair of the Board, Amnesty International (USA); Former President, Policy Sciences Center; Fellow, Royal Society for the Encouragement of Arts, Manufactures, and Commerce; Fellow, World Academy of Art and Science.

** The World Bank, Washington D.C.; Member of the Florida and District of Columbia Bars; Senior Teaching and Research Fellow, Institute for Human Rights, Peace and Development, Levin College of Law, University of Florida. The views expressed are those of the authors and do not represent those of The World Bank Group or its Board of Directors. The authors would like to acknowledge and thank Ryan Koslosky for his helpful comments.

The British political theorist, Harold Laski, wrote that “what is important in the nature of power is the end it seeks to serve and the way in which it serves that end.”¹ The question remains as to whether the allocation of power from the state to civil society—particularly the private sector—in any way reconciles the world order problems generated by state absolutism. It is generally well accepted that the all-powerful state, which lacks checks and balances, transparency, responsibility, and accountability, is a dangerous and destructive political artifact. However, shifting power to civil society may not ameliorate the power problem.

Civil society is a nascent form of global democratization. Segments of civil society adhere to particular ideological constructs, which can either improve or worsen world order. These constructs are typically shaped by influential ideologies that object to the way in which states traditionally enjoy sovereign power, despite, as some argue, the lethal and sometimes economically inefficient ways this power is exercised.² Despite these inefficiencies, a dangerous ideology has taken root in the years since the end of the Cold War. Hailed as a “solution” to the problem of state power,³ the development of private power, particularly in the context of supporting and supplementing military combat, may instead prove to be harmful to the international constitutive process.

Regardless of the outcome of this analysis, it is clear from the reality of the distribution of power in the global civil society that the international constitutional system is changing. These changes might extend to the fundamental operational code of rules and understandings within the power system. When these changes are viewed in the context of the shifting authority standards of contemporary events, particularly in the areas of warfare and foreign policy, the need for a more precise analysis of which changes have become operational laws and which rules of conventional law have been confirmed or depreciated becomes evident.

Privatization of military combat functions is not a novel phenomenon. Some aspects of this form of privatization have indeed been fairly comprehensively analyzed, resulting in many commentaries on the lack of accountability and near absence of regulation of private military and security services, general admonitions against allowing questionably principled private actors driven by profit to capitalize on this regulatory lacuna, and criticisms of the various bloody combat errors committed by Private Military Contractors (PMCs)⁴ and Private Security Contractors (PSCs),⁵ which,

1. HAROLD J. LASKI, *GRAMMAR OF POLITICS* 45 (1925).

2. See Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 143-45 (2004) (detailing a series of ideological constructs as they relate to state sovereignty); see also *id.* at 171-76 (setting out twelve state typologies in the international system, based in part on the ideologies expressed earlier in the article).

3. See generally MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (discussing the pros and cons of privatizing public institutions and suggesting a need for public accountability).

4. See, e.g., Fred Schreier & Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* 17 (Geneva Centre for the Domestic Control of Armed Forces (DCAF), Occasional Paper No. 6, 2005), available at http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf (“The term private military company (PMC) does not exist within any current international legislation or convention.”).

5. See, e.g., *id.* at 26 (stating that many PMCs prefer to avoid the stigma associated with the title, and

in many cases, have been tantamount to slaughtering innocent bystanders in conflict zones. These commentators and policy makers typically harmonize on the need to enhance regulatory safeguards and overall accountability, as well as to reform the rules governing contractual arrangements between government authorities and PMCs or PSCs.⁶ Indeed, it might be argued that the debate surrounding the concept of privatized combat is characterized by an intellectual, scholastic staleness. However, we submit that there are as yet unexamined dangers posed by the military-private industry dyad, and we advocate a total reconsideration of the fundamental realities of the world order implications of PMCs and PSCs in the context of combat functions. Assaying these as yet unexamined global implications of the problem of power as it pertains to PMCs and PSCs presents an uneasy point of analytical departure; such an explorative effort traditionally requires authors to offer some definition of the subject matter in the context of international law and international relations. It further assumes that we can, to some degree, understand and measure these implications.

In this Article, we will examine these world order implications through the prism of the world constitutive process. This process is one of continuing communication and collaboration that examines, refines, and allocates competence in the international system.⁷ The process of contextual mapping might shed light on the terms associated with, and concepts communicated by, privatized military combat, which might be better understood when the contexts in which they are used are illuminated in a discriminating manner. Their multiple meanings are given coherence when we appreciate the divergent contexts within which they are used. To develop the appropriate predicate for contextual mapping, we recognize that, notwithstanding the various nuanced meanings attached to the concept of privatized military combat—as an outsourcing of national security responsibilities, as a part of a nation-building campaign to bring stability to a weak or failed state, as a mechanism to subvert

thus “call themselves [a] Security Company in order to attract less attention from the media, [and] to have a better claim to legitimacy or less reason to fear regulation”).

6. Even Enrique Bernales Ballesteros, the Special Rapporteur on the question of the use of mercenaries, did not advocate a total rethinking of the efficacy and legality of PMCs and PSCs. In his 2000 report to the U.N. Secretary General, Ballesteros stated that “private companies play an important role in the area of security.” The Secretary General, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 44, transmitted to the members of the General Assembly, U.N. Doc. A/55/334 (Aug. 30, 2000) [hereinafter *Use of Mercenaries*], available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/32a654ebb6cceb5c1256982003ad94b/\\$FILE/N0062602.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/32a654ebb6cceb5c1256982003ad94b/$FILE/N0062602.pdf) (containing the Report prepared by Special Rapporteur Enrique Bernales Ballesteros). Without examining why and how PMCs and PSCs are dangerous to world public order, Ballesteros suggested certain limited reforms: “Greater rigour and precision must be achieved in concepts and definitions, avoiding generalizations and ensuring clear legal regulations; private activity in the area of security and military advice and assistance should be monitored by a specialized public international institution.” *Id.* ¶ 46.

7. According to Harold Lasswell and Myres McDougal, co-creators of the policy sciences framework: [The] “constitutive process,” emphasizing different phases in decision, may be described as the decisions which identify and characterize the different authoritative decision-makers in a community, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for decision and sanctioning purposes, [and] authorize procedures for making the different kinds of decisions . . . necessary to making and administering general community policy.

HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 93 n.1 (1992).

congressional oversight, as a pretext to channel money to certain corporations, and more, we can nevertheless distill points of reference of sufficient conceptual generality to give coherence to the appropriate description of this form of outsourcing in the context of contemporary international law and international relations.

Contextual mapping involves the “freeing” of inquiry from ideological or psychopathological constraints in order to reveal irrationalities and thus reduce their misrepresentative effect on the process of inquiry. Celebrated political scientist and co-creator of the policy sciences framework, Harold Lasswell, conceived that contextual mapping could yield freedom:

By freedom is meant the bringing into the focus of awareness of some feature of the personality which has hitherto operated as a determining factor upon the choices made by the individual, but which has been operating unconsciously. Once elevated to the full focus of waking consciousness, the factor which has been operating “automatically and compulsively” is no longer in this privileged position. The individual is now free to take the factor into consideration in the making of future choices.⁸

In other words, contextual mapping provides a set of markers by which we may more realistically appreciate the challenges and fluidity of the evolving international constitutional order. The constitutive implications arising from military privatization efforts⁹ are particularly grave, especially where political leaders are able to operate outside norm-generating forces, including public scrutiny, government oversight, and domestic and international law. Indeed, avoiding these forces might be the very reason that some government officials seek to outsource combat functions to PMCs.

II. JEOPARDIZING THE ROLE OF THE STATE: THE CRITICAL WORLD ORDER IMPLICATIONS OF MILITARY PRIVATIZATION

Private military actors and mercenary forces have been a fixture in warfare from long before the nation-state was acknowledged to be the principal political construction.¹⁰ Currently, the United States, the United Kingdom, South Africa, and

8. HAROLD D. LASSWELL, *Democratic Character*, in *THE POLITICAL WRITINGS OF HAROLD D. LASSWELL* 465, 524 (1951).

9. This Article examines the world order implications of combat privatization, as opposed to the administrative privatization agenda, designed to replace conventional government responsibilities. Aspects of combat privatization that are salient to this Article include the carrying out of covert operations; supplementing war zone needs; appraising risks associated with certain combat zones; destroying weapons systems; supplying intelligence to secure particular sites, including local or provisional government buildings and facilities of public importance; creating and disseminating surveillance propaganda; training local military forces, as well as police or paramilitaries; procuring weapons; providing technological support, including cyber security; supplying strategic transportation; and various other logistical and supplemental support for all branches of the armed forces. See Griff Witte, *New Law Could Subject Civilians to Military Trial; Provision Aimed at Contractors, but Some Fear It Will Sweep Up Other Workers*, WASH. POST, Jan. 15, 2007, at A1 (remarking on some of the functions of PMCs, including “serving meals, guarding convoys and interrogating prisoners”).

10. See Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 2 (2003) (chronicling various uses of mercenary forces throughout thousands of years of human history).

Israel are home to most of the world's PMC market.¹¹ The continuing growth of PMCs is the ostensible result of aggressive development efforts of neo-liberal economics in the 1980s, which capitalized on a major ideological component lurking in the interstices of the perceived imperatives of the global political economy and development. In response to the notion that states can be inefficient market actors, or otherwise serve as a depressant on global economic enterprise, an ideological direction emerged during the administrations of U.S. President Ronald Reagan and U.K. Prime Minister Margaret Thatcher that sought to free economic enterprise from the constraints of both national and international interventions that were conceived to be uneconomic.¹² At the time this ideological position was developing, there was a powerful incentive at the level of the global political economy to promote deregulation from the regional to the global level.¹³ A further implication of the deregulation and privatization of the global political economy involved the specific and controversial question about how far the process could extend without compromising the normal and, by some accounts, essential public functions of the nation-state.¹⁴ It was the position of the Reagan Administration that far more of government expenditures on

11. U.K. FOREIGN AND COMMONWEALTH OFFICE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2002, H.C. 577, ¶ 23, available at <http://globalpolicy.org/security/peacekpg/general/2002/0212ukreport.pdf> ("As far as countries of origin are concerned the literature suggests that the United States, South Africa, the UK and Israel are particularly prominent.").

12. See Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT'L L. 517, 517-22 (2001) (discussing the phenomenon of neoliberalism). As author Lisa Duggan explains,

Neoliberalism, a political label retrospectively applied to the "conservative" policies of the Reagan and Thatcher regimes in the U.S. and Great Britain, rocketed to prominence as the brand name for the form of pro-corporate, "free market," anti-"big government" rhetoric shaping Western national policy and dominating international financial institutions since the early 1980s. This "neo" liberalism is usually presented not as a particular set of interests and political interventions, but as a kind of non-politics—a way of being reasonable, and of promoting universally desirable forms of economic expansion and democratic government around the globe.

LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 10 (2003).

13. See WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 264-71 (1997) (discussing the evolution of the neoliberal "Washington Consensus," which championed deregulation and privatization); see also John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7, 7-18 (John Williamson ed., 1990) (discussing the concept of the "Washington Consensus" and setting out the economic model of neoliberalism).

14. Professor Richard Falk writes:

The neoliberal ideological climate of opinion induces the social disempowerment of the state, shifting responsibility for human betterment increasingly to the private sector. The globalization of business, finance, and informatics, along with a support set of international institutions operating in accordance with neoliberal logic, has fashioned a system of global economic governance that is at once far more powerful than the United Nations and organized in a manner that is even less representative of the peoples of the world and their diversities of civilization and religion.

Richard Falk, *Interpreting the Interaction of Global Markets and Human Rights*, in *GLOBALIZATION AND HUMAN RIGHTS* 61, 72 (Alison Brysk ed., 2002); see also Gerald Epstein et al., *Introduction to CREATING A NEW WORLD ECONOMY: FORCES OF CHANGE AND PLANS FOR ACTION* 1, 1-4 (Gerald Epstein et al. eds., 1993) (explaining the adverse effect of the "conservative consensus" on free market ideology at the national and international levels).

defense should be allocated to the private sector.¹⁵ Reagan's Secretary of Defense, Donald Rumsfeld, seemed to endorse the notion that any governmental function that *could* be privatized *should* be privatized.¹⁶ Two critical sectors of the U.S. national landscape, security functions and intelligence collection and analysis, went under the microscope for possible privatization.¹⁷ Because expenditures in these two areas accounted for a vast percentage of the federal budget, it was thought that a quantum leap in the direction of privatization would be quite a revolutionary change in the nature of the state and the constitutional foundations upon which it was built.¹⁸

The ensuing wave of government downsizing generated various economic opportunities that the private sector seized upon.¹⁹ Following the end of the Cold War, the administrations of George H. W. Bush and Bill Clinton sought to continue this reform; various military and intelligence functions which had long been executed by

15. In 1987, President Reagan established a President's Commission on Privatization to "review the appropriate division of responsibilities between the Federal government and the private sector." Exec. Order No. 12,607, 53 Fed. Reg. 34, 190 (Sept. 2, 1987); PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT, REPORT OF THE PRESIDENT'S COMMISSION ON PRIVATIZATION xxi (1988) ("The Commission believes that increased private sector participation in activities currently performed by the public sector has great potential for increasing the efficiency, quality, and constructive innovation in providing goods and services for the benefit of all the people."). See generally Michal Laurie Tingle, *Privatization and the Reagan Administration: Ideology and Application*, 6 YALE L. & POL'Y REV. 229 (1988) (examining two different Reagan Administration proposals targeted at different types of inefficiency).

16. In a speech delivered on September 10, 2001, then-Secretary of Defense Donald Rumsfeld championed the devolution of functions across the Department of Defense to the private sector "from bureaucracy to the battlefield, from tail to the tooth." Donald H. Rumsfeld, Remarks at the Department of Defense Acquisition and Logistics Excellence Week Kickoff—Bureaucracy to Battlefield (Sept. 10, 2001), available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=430>.

17. See Walter Pincus & Stephen Barr, *CIA Plans Cutbacks, Limits on Contractor Staffing*, WASH. POST, June 11, 2007, at A2 (examining the privatization trend of U.S. intelligence and security work).

18. Devolving defense responsibilities, including intelligence mobilization and security, from the military machine to the private sector manifests a fundamental shift away from long held convictions about certain governmental responsibilities underpinned by the Constitution. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26-27 (1974) (arguing that the state must exclusively be responsible for national defense); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1300 (2003) (conceding that privatization of a relatively few certain activities "such as foreign policy or national defense" seems "unfathomable"); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1444 (2003) (remarking on how devolving certain government responsibilities, including national defense, to private actors has highly problematic implications that should be avoided). See generally Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1009-10 (2004) (identifying dangers of privatization and how some "delegations of sensitive military responsibilities threaten to [] violate the constitutional imperatives of limited and democratic government").

19. See BONN INTERNATIONAL CENTER FOR CONVERSION, CONVERSION SURVEY 1998: GLOBAL DISARMAMENT, DEFENSE INDUSTRY CONSOLIDATION AND CONVERSION 39 (1998) (reporting that between 1987 and 1996, the armed forces in countries throughout the world downsized by more than six million soldiers); see also JOANNA SPEAR, MARKET FORCES: THE POLITICAL ECONOMY OF PRIVATE MILITARY COMPANIES, ECONOMIES OF CONFLICT: PRIVATE SECTOR ACTIVITY IN ARMED CONFLICT, FAO REPORT #531, 12 (2006), available at <http://www.fao.no/pub/rapp/531/531.pdf> ("A . . . structural factor behind the rise of PMCs is the post-Cold War draw-down of armed forces and the end of apartheid-driven conflicts in Africa, which . . . led to a glut of trained manpower.").

the Pentagon were outsourced to private industry.²⁰ This downsizing has indeed proven lucrative for former government authorities, as well as for former officers in the U.S. military machine.²¹ It has likewise proven to be lucrative for certain elected officials, who have benefited from funds raised by the PMC and PSC lobbies.²² As a result, the PMC and PSC industries have experienced explosive growth in recent years.²³ The privatization trend will, in all probability, continue to enjoy strong growth, which is a chilling notion because the long term world order implications of the use of PMCs—both the on-the-ground results in any given military conflict, as well as the effect on the larger decision and constitutive processes—are inescapably problematic.

Commentators have noted that the growth and increasing number of PMCs and PSCs are largely attributable to the increasing savviness of the industry,²⁴ in

20. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1983) (outlining the government's privatization guidelines); J.T. Mlinarcik, *Private Military Contractors & Justice: A Look at the Industry, Blackwater, & the Fallujah Incident*, 4 REGENT J. INT'L L. 129, 131-33 (2006) (examining the outsourcing of certain Pentagon functions during the Reagan, Bush I, and Clinton administrations); Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1, 4-9 (1993) (examining efforts by the administrations of Presidents Reagan, Bush I, and Clinton to privatize).

21. Indeed, conflict operations in Iraq have been particularly lucrative for U.S. and non-U.S. PMCs and PSCs alike. See Schreier & Caparini, *supra* note 4, at 22 ("In 2003, Halliburton's Pentagon contracts increased from \$900 million to \$3.9 billion, a jump of almost 700 percent . . . [It] now has over \$8 billion in contracts for Iraq[,] . . . [which] could hit \$18 billion if it exercises all of its options . . . Iraq contracts have boosted the annual revenue of British-based PMCs alone from \$320 to more than \$1.7 billion."). The Washington Post has also reported that:

The private security industry has surged in Iraq because of troop shortages and growing violence. After the March 2003 invasion, hundreds of foreign and Iraqi companies, many of them new, signed contracts with the U.S. and British militaries, the State Department, the Iraqi government, media and humanitarian organizations and other private companies.

The size of this force and its cost have never been documented. The Pentagon has said that about 20,000 security contractors operate in Iraq, although some estimates are considerably higher.

Steve Fainaru, *U.S. Pays Millions In Cost Overruns For Security in Iraq*, WASH. POST, Aug. 12, 2007 at A1.

22. Schreier & Caparini, *supra* note 4, at 70 ("17 of the nation's leading PMCs have invested more than \$16 million in congressional and presidential campaigns since 1999.").

23. See Caroline Holmqvist, *Private Security Companies: The Case for Regulation 2* (Stockholm Int'l Peace Research Inst. (SIPRI), Policy Paper No. 9, 2005), available at http://www.sipri.org/contents/conflict/SIPRI_PolicyPaper9.pdf (explaining that the growth of PMCs and PSCs is due to "[a] variety of both demand- and supply-side factors"). Authorities from the Stockholm International Peace Research Institute attribute this growth to the following three conditions:

(a) the dominance of post-cold war free market models of the state, propelling a strong trend towards the outsourcing of traditional government functions; (b) the global downsizing of national militaries, providing a vast pool of trained former military personnel for recruitment by private companies; and (c) the gradual disengagement of the major powers from many parts of the developing world.

Id.

24. See Carlos Ortiz, *Regulating Private Military Companies: States and the Expanding Business of Commercial Security Provision*, in GLOBAL REGULATION: MANAGING CRISES AFTER THE IMPERIAL TURN 205, 208 (Keesvander Pijl, Libby Assassi & Duncan Wiggan eds., 2004) (citing examples of expanding PMCs, such as Sandline International, which have recognized the potential profit associated with exploiting "the volatile security environment of the new millennium").

conjunction with an ever growing market niche.²⁵ Private security and private military contractors have in particular capitalized on the so-called "war on terror," launched by President George W. Bush following the 9/11 attacks on the United States, and are seeking to expand into humanitarian relief, including support in the aftermath of natural disasters.²⁶ Thus, while the discourse about private military contractors has changed to accommodate other, more complex aspects of the services they offer, it cannot be removed entirely from the discourse on mercenarism, particularly because the industry is home to enormous numbers of retired military personnel²⁷ and is worth hundreds of billions of dollars.²⁸ Indeed, in practice, the line between combat operations and service delivery has been noticeably indistinct; there has been an alarming lack of clarity as to when private military actors have assumed combat roles versus when they have been limited to training and other non-combat roles.²⁹

It is suspiciously incongruous that even though mercenary forces apparently decrease stability in the international system,³⁰ the International Convention against the

25. See Peter Singer, *The Dogs of War Go Corporate*, LONDON NEWS REV., Mar. 19, 2004, available at http://www.brookings.edu/opinions/2004/0319defenseindustry_singer.aspx ("Private military firms now operate in more than 50 countries and do up to \$100 bn. in business a year.").

26. See HUMANITARIAN POLICY GROUP AT THE OVERSEAS DEV. INST., RESETTling THE RULES OF ENGAGEMENT: TRENDS AND ISSUES IN MILITARY-HUMANITARIAN RELATIONS 70 (Victoria Wheeler & Adele Harmer eds., 2006), available at <http://www.odi.org.uk/HPG/papers/hpgreport21.pdf> ("The extent of contracting between humanitarian actors and PMFs [Private Military Firms] seems to be greater than is generally recogni[z]ed, or at least publicly acknowledged.").

27. See Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, April 14, 2002, at A1 (reporting that retired Army Lt. Gen. Harry Soyster, who is now an executive at Military Professional Resources, Inc. (MPRI), a prominent PMC, has boasted that "[w]e've got more generals per square foot here than in the Pentagon").

28. See Shawn Macomber, *You're Not in the Army Now: Should the Pentagon Be in the Business of Outsourcing War?*, THE AMERICAN SPECTATOR, Nov. 2004, at 26, 26 ("Private military firms . . . have become a \$100 billion a year industry"); Laura Peterson, *Privatizing Combat, the New World Order*, CENTER FOR PUBLIC INTEGRITY, Oct. 28, 2002, <http://www.publicintegrity.org/bow/report.aspx?aid=148> (reporting that between 1994 and 2002, "the U.S. Defense Department . . . entered into 3,061 contracts with . . . PMCs Pentagon records valued those contracts . . . [at] more than \$300 billion").

29. See *infra* text accompanying note 51; see also Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 160 (1999) (remarking on the lack of a practical distinction between private military contractors and combatants). Additionally, according to Hans-Peter Gasser:

A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians.

Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 209, 232 (Dieter Fleck ed., 1995); see also INGRID DETTER, THE LAW OF WAR 146 (2nd ed. 2000) ("[T]here is . . . confusion as to who is a combatant and who is a civilian as a result of the lack of stringent criteria for qualifications as a combatant.").

30. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1026 (2005) ("[T]he growing role of private military companies is a symptom of a larger, dangerous challenge to the aspirations of order in the world represented by the system of nation-states and the rule of law."); Press Release, Sen. Jack Reed, Statement by Senator Reed Regarding the Private Contractor Allegations (February 16, 2005), available at

Recruitment, Use, Financing, and Training of Mercenaries³¹ has nevertheless failed to receive broad support from individual states within the international community.³² Special Rapporteur Ballesteros has stated that “[PMCs and PSCs] should not participate actively in armed conflicts, . . . much less attempt to replace the State in defending national sovereignty, preserving the right of self-determination, protecting external borders or maintaining public order.”³³ Indeed, in recent years, there have been many similar condemnations of the use of private military contractors in combat operations, even while the trend of outsourcing various military functions to private contractors, including combat operations, has grown.³⁴

There are several sources of international law that describe and proscribe mercenary activities,³⁵ of which the Geneva Conventions are the chief recipients of scholastic and governmental attention.³⁶ The Geneva Conventions set out a strict account of the kinds of forbidden activity that comprise mercenarism. Article 47(2) of Protocol I of the Geneva Conventions states that:

<http://reed.senate.gov/newsroom/details.cfm?id=257262>. See generally John McGinnis, *The Decline of the Western Nation States and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996).

31. G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989).

32. To date, the convention has 17 signatories and 30 party ratifications, with the noticeable absence of the United States, the United Kingdom, Israel, and South Africa. Participants in the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (on file with authors), available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty6.asp> (last visited Oct. 23, 2007).

33. *Use of Mercenaries*, *supra* note 6, ¶ 44.

34. DAVID ISENBURG, A GOVERNMENT IN SEARCH OF COVER: PMCs IN IRAQ 5 (2006), <http://www.basicint.org/pubs/Papers/pmc0603.pdf> (“[T]he increase in the use of PMCs has grown dramatically these last fifteen years. During the first Gulf War in 1991 for every one contractor there were 50 military personnel involved. In the 2003 conflict the ratio was 1 to 10.”). Indeed, many partners who are actively cooperating with PMCs and PSCs seek to avoid the spotlight in light of the negative connotations associated with PMCs. HUMANITARIAN POLICY GROUP AT THE OVERSEAS DEV. INST., *supra* note 26, at 70 (“Koenraad Van Brabant, a former co-director of the Humanitarian Accountability Project International, has noted that despite the growing use of [PMC]s, ‘there is widespread refusal to square up to the subject’ . . . [I]n private[,] humanitarian acceptance of private military firms is growing, but in public the subject is still a source of embarrassment.” (citations omitted)).

35. G.A. Res. 44/34, *supra* note 31, art. 1 (defining mercenary activity); Organization of African Unity Convention for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/433/Rev. L., Annex 1 (1972), available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention_on_Mercenaries.pdf (setting out in the preamble that OAU heads of state are “[d]etermined to take all necessary measures to eliminate from the African continent the scourge that mercenarism represents”); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), principle 1, U.N. Doc. A/RES/2625 (XXV) (Oct. 24, 1970) (“Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”).

36. See generally Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348 (1987) (arguing that the Geneva Conventions and their Additional Protocols have been elevated to *jus cogens* status, the normative foundations of which collectively comprise the lowest common denominator of all international humanitarian law). The International Court of Justice has additionally accepted that parts of the Geneva Conventions have been elevated to *jus cogens* status. See *id.* at 358; see also THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 191-97 (1988) (suggesting that the Geneva Conventions and their Additional Protocols are the principle sources of authoritative guidance on humanitarian law).

A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) Is not a member of the armed forces of a Party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.³⁷

The ostensible goal of this definition is to extend human rights protections to as many civilians and combatants as possible,³⁸ particularly in light of the explicit prohibition of extending the Geneva Conventions' protections to mercenaries.³⁹ Article 47(1) of Protocol I explicitly states that "[a] mercenary shall not have the right to be a combatant or a prisoner of war."⁴⁰ Under the 1949 Third Geneva Convention, treatment of PMCs and PSCs is presumably governed by Article 4(A)(4), which sets out a category for "[p]ersons who accompany the armed forces without actually being members thereof, such as . . . supply contractors [and] members . . . of services responsible for the welfare of the armed forces."⁴¹ Article 4(A)(4) states that where the contracting party has issued the supply contractor a valid identity card, that contractor, if captured, is entitled to prisoner of war protections.⁴² If, however, that contractor in any way engages in combat operations, he or she may be classified as a mercenary under Article 47 of Protocol I,⁴³ and thus not be entitled to prisoner of war protections under the Geneva Conventions.⁴⁴ Strictly speaking, mercenaries are not

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47(2), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

38. The Geneva Conventions provide for sweeping humanitarian protections. *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (detailing protections that apply to all four of the Geneva Conventions); *see also* JEAN DE PREUX, INT'L COMM. OF THE RED CROSS, COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean S. Pictet ed., A.P. de Heney trans., 1960) ("[T]he scope of application of . . . Article [3] must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form . . . does not . . . increase in the slightest the authority of the rebel party.").

39. In 2001, the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries entered into force; it sets out a definition for "mercenary" that is nearly identical to that set out by the Geneva Conventions, and makes it an offense to recruit, use, finance, or train a mercenary. G.A. Res. 44/34, *supra* note 31, arts. 1 & 2. Captured contractors that meet any of these criteria thus have far fewer protections against certain practices designed to extract information. *Id.*

40. Protocol I, *supra* note 37, art. 47(1).

41. Convention Relative to the Treatment of Prisoners of War art. 4(A)(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The Geneva Convention defines a Prisoner of War as an individual who is part of a command structure, visibly wears an insignia, openly carries a weapon, and adheres to the laws of war. *Id.* art. 4(A)(2).

42. *Id.*

43. Protocol I, *supra* note 37, art. 47.

44. This assumes that the individuals mentioned in Article 4(A)(4) do not fall under the definition of

entitled to human rights protections under Protocol I because Article 47 does not delineate the protections to which mercenaries are entitled; specifically, there is no language that applies Protocol I's procedural requirements, found in Article 45, or the rights referenced in Article 75, to captured mercenaries.⁴⁵ Accordingly, contracted military or security operators who employ offensive force in a war zone may arguably be categorized as unlawful combatants.

The rigid categorizations concerning prisoner of war status in the Geneva Conventions apparently throw out the proverbial baby with the bath water, for, in an effort to preempt any possible abuses of this definition, the drafters set out such a narrow⁴⁶ construct of what activity qualifies as mercenarism, that the resulting language has little practical value in ascertaining whether an individual or organization is indeed engaged in mercenary activity.⁴⁷ No concerted effort has been institutionalized to rectify this significant problem, despite continued calls for reform by international law scholars and expert-practitioners. Indeed, in a 1997 report to the U.N. Commission on Human Rights, Special Rapporteur Enrique Ballesteros wrote that:

An analysis of the factors behind the recurrence of [mercenarism] . . . must consider the problems caused by gaps in existing legislation and by flexibility with regard to classification as a mercenary. The persistence of mercenary activities, the range and variety of the forms in which they are carried out and the hidden networks of complicity behind these activities suggest that States, particularly the smallest and weakest ones, are not adequately protected against the use of mercenaries in its

mercenary articulated in Article 47 of Protocol I. *See id.* Article 4 sets out categories under which an individual may be entitled to prisoner of war (POW) status. Convention Relative to the Treatment of Prisoners of War, *supra* note 41, art. 4. *See generally*, Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004).

45. Protocol I, *supra* note 37, arts. 45, 47 & 75.

46. *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 524 (2004) ("[T]he very definitions that international law uses to identify mercenaries include a series of vague, albeit restrictive, requirements, such that it is nearly impossible to find anyone in any place who fulfills all of the criteria, let alone a firm in the [PMC] industry."). U.S. Ambassador George Aldrich likewise explained the narrow definition of "mercenary" in detail:

[First], the provision requires that, to be a mercenary, a person must be "specially recruited . . . in order to fight in an armed conflict," that is, as a combatant, not merely as an adviser, and for a particular armed conflict, not simply to be available for any conflicts that may come along. Second, it provides that a person cannot be a mercenary unless and until he "does, in fact, take a direct part in the hostilities"; so even a mercenary is not a mercenary until he goes into combat. Third, it is specified that to be a mercenary, a person must be motivated "essentially by the desire for private gain and, in fact, is promised . . . material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party." This standard requires proof both of motive and of the fact of promised compensation that is significantly higher than that of others who have similar responsibility and perform similar functions. Thus, fighter pilots, for example, can be paid much more than infantry, provided all pilots of equal rank receive roughly the same pay and that much higher pay is not given to certain pilots "specially recruited."

George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 776-77 (1981).

47. *See* Aldrich, *supra* note 46, at 777 ("[I]t would not seem difficult in the future for any party to a conflict to avoid [the] impact [of this definition of mercenary.]").

different forms. The international legal instruments that serve as a framework for the consideration of the question are imperfect and contain gaps, inaccuracies, technical defects and obsolete terms that allow overly broad interpretations to be made in order to prevent persons who are in fact nothing but mercenaries from being classified as such.⁴⁸

Commentators are thus obliged to use common sense appraisals of activities to discern whether or not they comprise mercenarism.

In 1999, Special Rapporteur Ballesteros further warned that the hypothetical line that separates mercenarism from certain PMC and PSC activity is either extremely blurry or utterly non-existent.⁴⁹ Specifically, he stated that “today’s mercenaries do not work independently. They are more likely to be recruited by private companies offering security services and military advice and assistance, in order to take part or even fight in internal or international armed conflicts.”⁵⁰ Even supposed distinctions between mercenarism and purported non-combat-related conflict support have been called into question vis-à-vis a more practical understanding of what comprises mercenarism. For example, former U.K. Foreign Secretary Jack Straw presented a Green Paper to Parliament in 2002, entitled *Private Military Companies: Options for Regulation*, a conclusion of which was that “[t]he distinction between combat and non-combat operations is often artificial.”⁵¹

So, to what extent are PMC and PSC operatives entitled to the protections of the Geneva Conventions, particularly when they have identifiable insignia, identifiable weaponry, and their functions place them closely proximate to the prospect of engagement with a so-called enemy?⁵² It may be that the U.S. government’s detainee

48. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 84, U.N. Doc. E/CN.4/1997/24 (Feb. 20, 1997) (submitted by Enrique Bernales Ballesteros).

49. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 35-44, 74, 80, U.N. Doc. E/CN.4/1999/11 (Jan. 13, 1999) (submitted by Enrique Bernales Ballesteros).

50. *Id.* ¶ 35.

51. U.K. FOREIGN AND COMMONWEALTH OFFICE, *supra* note 11, at 8.

52. The Department of Defense has set out laughably general requirements concerning the participation of private contractors in combat operations:

International Law and Contractor Legal Status. Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. . . . If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status. Contingency contractor personnel may be at risk of injury or death incidental to enemy actions while supporting other military operations. *Contingency contractor personnel may support contingency operations through the indirect participation in military operations*, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services . . . and providing logistic services such as billeting, messing, etc. Contingency contractor personnel retain the inherent right of individual self-defense. . . . Each service to be performed by contingency contractor personnel in contingency operations shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance

criteria could be applied to a very significant number of PMC operatives in zones of high-intensity conflict.⁵³ Are these operatives entitled to human rights and humanitarian law protections? If they are not, does that mean that they are effectually combatants without a direct legal status in international law? In short, are they unlawful combatants? And can the United States absolve itself of obligations under the Geneva Conventions, as well as other general human rights responsibilities, if violations are done to enemy combatants and/or civilians on the basis that the PMC

with relevant laws and international agreements.

UNITED STATES DEPARTMENT OF DEFENSE, INSTRUCTION NO. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES ¶ 6.1.1 (Oct. 3, 2005), *available at* www.dtic.mil/whs/directives/corres/rft/302041x.rtf (emphasis added). *See generally* Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting With Enemy Forces*, 40 AM. CRIM. L. REV. 159 (2003).

53. There is no clear definition of “detainee” as it pertains to enemy combatants because the U.S. government has only provided narrow examples of behavior that it describes as being perpetrated by enemy combatants. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The first detainees, which the United States sent from Afghanistan to Guantanamo in 2002, were merely described as “unlawful combatants” under the World War II-era standard set out by *Ex parte Quirin*, 317 U.S. 1 (1942), in 1942. *See id.* at 30-31 (explaining that “the law of war draws a distinction between . . . those who are lawful and unlawful combatants”). The government set out a narrower definition in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which defined “enemy combatant” as an individual who is “‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.” *Id.* at 516. Also, in a 2004 Pentagon memo, Deputy Secretary of Defense Paul Wolfowitz set out the following definition of “enemy combatant”:

[T]he term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. *But see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 474-78 (holding that the government’s definition of “enemy combatant” is vague and overly broad). Ambassador Pierre-Richard Prosper, the United States Ambassador-at-Large for War Crimes Issues offered the following explanation of the government’s treatment of detainees:

The war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed. A careful reading of the Prisoners of War Conventions clearly leads one to the conclusion that its provisions do not apply to terrorists who are engaged in an activity that is fundamentally at odds with the Conventions. . . . This conference asks the important question of whether terrorists have rights. They do—to be treated humanely. However, they do not deserve nor should they be given heightened status or benefits that are reserved for lawful belligerents. We should not seek to legitimize their conduct or organization by conferring upon them unearned status. Bestowing Prisoner of War status on detainees who do not meet the clear requirements of the law would undermine the rule of law by diminishing norms found in the plain language of the Geneva Convention itself. It would confer the status and privileges of a law-abiding soldier on those who purposefully target women and children. Unlawful combatants by their nature forfeit special benefits and privileges accorded by the Geneva Convention on the Treatment of Prisoners of War. If captured, they are apprehended for their criminal activity and not as prisoners of war as envisioned by the Geneva Convention.

Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Remarks at Chatham House, London, U.K.: Status and Treatment of Taliban and al-Qaida Detainees (Feb. 20, 2002) (transcript available at http://www.state.gov/s/wci/us_releases/rm/2002/8491.htm).

violators, who might employ certain interrogation techniques that are tantamount to torture, are not public actors and therefore the state is not obligated under these instruments to be responsible for their conduct?

This accelerating expansion of PMCs and PSCs has instigated controversy concerning how these actors are to be controlled and regulated,⁵⁴ and it highlights the limits of national law.⁵⁵ National law has been problematic, particularly because, in many instances, the same government officials who established the national security rule framework have left government service to join PMCs or to otherwise create private security consulting firms of their own.⁵⁶ Accordingly, to note that the privatized military services industry is not transparent is a significant understatement.⁵⁷

54. Peter Singer, a fellow at the Brookings Institution, has examined this controversy in depth. He writes:

[PMCs,] [o]n both the personal and the corporate level, . . . [are characterized by] a striking absence of regulation, oversight, and enforcement. Although private military firms and their employees are now integral parts of many military operations, they tend to fall through the cracks of current legal codes, which sharply distinguish civilians from soldiers. Contractors are not quite civilians, given that they often carry and use weapons, interrogate prisoners, load bombs, and fulfill other critical military roles. Yet they are not quite soldiers, either.

Peter W. Singer, *Outsourcing War*, FOREIGN AFF., Mar.-Apr. 2005, at 5, available at <http://www.brookings.edu/views/articles/fellows/singer20050301.htm>.

55. An example of the limits of national law in the United States is the War Powers Resolution, which was designed to assure Congress a role in Executive decisions to engage the United States in a military conflict. Section 3 of the War Powers Resolution requires that the President consult with Congress prior to and during hostilities; Section 5(b) requires that the President terminate the use of U.S. armed forces within sixty days (plus a thirty-day extension in the event of "unavoidable military necessity") if Congress has not issued a declaration of war, or otherwise has not passed a resolution authorizing the use of force. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, §§ 3-5 (1973) (codified at 50 U.S.C. §§ 1543(a)-(c), 1544(b) (2000)). For a critique of the efficacy of the War Powers Resolution, see Thomas M. Franck, *Rethinking War Powers: By Law or by "Thaumaturgic Invocation"?*, 83 AM. J. INT'L L. 766, 768 (1989) ("The War Powers Resolution was a good idea, but its drafting and execution were faulty."); see also Thomas M. Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605 (1977).

56. See Project on Government Oversight (POGO), *The Politics of Contracting*, <http://www.pogo.org/p/contracts/c/co-040501-contract-exec.html> (last visited Feb. 1, 2008) (stating, with reference to the U.S. government's continuing use of PMCs, that "it is frequently difficult for the public to determine where the government stops and the private sector begins"). The POGO report recommends that unnecessarily complicated existing laws that regulate post-government employment be simplified, and that more oversight is needed. See Schreier & Caparini, *supra* note 4, at 90-91. Commentators from the Geneva Centre for the Democratic Control of Armed Forces cite the POGO report's finding that:

A recent study of defense contracting in the US identified . . . high-ranking government officials over the past seven years who moved into the private sector to work as lobbyists, board members or executives of contractors. Moreover, at least one-third of these former high-ranking government employees had held positions that allowed them to influence government contracting decisions. . . . Typically, the large PMCs count many former military personnel as employees. The reputation that retired officers built while in public service may cause government officials, as well as members of the legislature, to give undue credence to their lobbying efforts.

Id.

57. During his opening statement in a hearing on government reliance on private military contractors in the Iraq reconstruction effort, Representative Henry Waxman, the Chairman of the Committee on Oversight and Government Reform stated:

We know that the war in Iraq has given private contractors an unprecedented role in

PMCs and PSCs also generate complex challenges to international law, particularly because it is unclear to what extent international law may bind them as they are not subject to the same obligation criteria as nation-states. In light of this lack of regulation, various non-governmental watch agencies have been established to provide some measure of public oversight of the industry, which would, or otherwise should, be performed by the individual national military establishments.⁵⁸

III. CONTEXTUAL MAPPING: THE DISCONNECT BETWEEN SOVEREIGN POWER AND PRIVATE MILITARY ACTORS

Conventional legal theory, chiefly analytical positivism and Benthamite pragmatic jurisprudence, views international law from the inflexible perspective of what the law simply is, without moral or ethical considerations. The continuing, widespread identification of law with the sovereign state has profoundly affected the development of international law. From the positivistic point of view, there can be no obligation on the state without the sovereign's consent. Many political elites still cling to this statist approach to law, which stresses an important and unifying dimension: the condition of control.⁵⁹ Accordingly, certain responsibilities are ascribed solely to the state.⁶⁰

providing security services. Almost \$4 billion in taxpayer funds has been paid for private security services in the reconstruction effort alone. But sorting out overhead, subcontracts, sub-subcontracts, profit, and performance has been nearly impossible.

It's remarkable that the world of contractors and subcontractors is so murky that we can't even get to the bottom of this, let alone calculate how many millions of dollars taxpayers lose in each step of the subcontracting process.

Hearing on Reliance on Private Military Contractors in Iraq Reconstruction Before the Comm. on Oversight and Gov't Reform, 110th Cong. (2007) (opening statement of Rep. Henry A. Waxman, Chairman, Comm. on Oversight and Gov't Reform).

58. These organizations include: Human Rights Watch, Amnesty International, International Action Network on Small Arms, InterAction, International Alert, and others. *E.g.*, Amnesty International, Corporate Accountability in the "War on Terror," http://www.amnestyusa.org/War_on_Terror/Private_Military_and_Security_Contractors/page.do?id=1101665&n1=3&n2=26&n3=157; Human Rights Watch, Q&A: Private Military Contractors and the Law: States Have an Obligation to Prosecute Perpetrators of War Crimes in Their Courts, <http://www.hrw.org/english/docs/2004/05/05/iraq8547.htm>.

59. As part of a novel perspective of international law and international relations, political scientists Harold Lasswell and Myres McDougal sought to shift attention away from pure positivism toward a policy-oriented constitutive approach. This new legal theory avoided positivism's formal insistence that the concept of law is based solely on rules. Instead, the policy sciences viewed international law as a process of decision-making, in which actors in the global community could illuminate and apply their common interests based on their expectations of what constituted an appropriate process and how to effectively control certain behavior. *See, e.g.*, Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, in *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 355, 360-62 (Myres S. McDougal & W. Michael Reisman eds., 1981).

60. In the United States, for example, inherently governmental functions are not subject to outsourcing. *See* Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382. The FAIR Act defines inherently governmental function as "so intimately related to the public interest as to require performance by Federal Government employees." *Id.* at § 5(2). The United States Office of Management and Budget also specifies that:

An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two

Among these various responsibilities, perhaps none is as critical to world order as the ability—preferably subject to certain conditions—to declare and wage war. Armed conflict is traditionally within the purview of the state, insofar as most sources of law, domestic and international alike, recognize that warfare is an exercise of sovereign power.

International law provides markers of the process by which effective sovereign power is exercised in domestic or international environments, which influences the prospect and efficacy of claims by states, but does not give us a more discriminating sense of the “map” of effective power. These markers are obscured when non-state actors enter the mix, particularly when these non-state actors derive “authorization” to act from a state. Indeed, a fundamental problem with PMCs and PSCs, which has been well analyzed,⁶¹ is that they are non-state actors that are not subject to the

categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves:

- (1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (3) Significantly affecting the life, liberty, or property of private persons; or
- (4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.

OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-76 (REVISED), MEMORANDUM TO HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS ON PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf.

61. *E.g.*, DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* (2005); PRATAP CHATTERJEE, *IRAQ, INC: A PROFITABLE OCCUPATION* (2004); MADELAINE DROHAN, *MAKING A KILLING: HOW AND WHY CORPORATIONS USE ARMED FORCE TO DO BUSINESS* (2004); FROM MERCENARIES TO MARKET: *THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* (Simon Chesterman & Chia Lehnardt eds., 2007); CHRISTOPHER KINSEY, *CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES* (2006); MICHAEL LEE LANNING, *MERCENARIES: SOLDIERS OF FORTUNE, FROM ANCIENT GREECE TO TODAY'S PRIVATE MILITARY COMPANIES* (2005); SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* (2007); FRED ROSEN, *CONTRACT WARRIORS: HOW MERCENARIES CHANGED HISTORY AND THE WAR ON TERRORISM* (2005); JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* (2007); GERALD SCHUMACHER, *A BLOODY BUSINESS: AMERICA'S WAR ZONE CONTRACTORS AND THE OCCUPATION OF IRAQ* (2006); P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003); PETER TICKLER, *THE MODERN MERCENARY: DOG OF WAR, OR SOLDIER OF HONOUR* (1987); *PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS* (Thomas Jager & Gerhard Kummel eds., 2007); MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* (1991); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007).

accountability akin to that assumed by, or imposed on, states.⁶² The most vital building block of the operational definition of "sovereign power" remains how authority and control are constituted. Contextual mapping might help to clarify these markers and their interactions so that the conditions of sovereign power might be better observed and, perhaps, understood.

Contextual mapping, referred to above, is associated with the New Haven School's approach to international law, which seeks to clarify the meaning and value of power in international law and international relations.⁶³ A study of power done by Lasswell, McDougal, and the New Haven School is the most radically contextual specification and mapping of the power process. The technique used to accomplish this end is comprehensive, flexible, and, at the same time, permissive of high particularity. This specifically means that particular claims or problems rooted in the minute detail of human interaction can nonetheless be mapped, described, and appraised against their world order background or context.

The most significant power-conditioned participants in global society are nation-states: the approximately 192 territorially organized bodies politic.⁶⁴ They are the central participants in the global community,⁶⁵ the world process of effective power,⁶⁶ and the world constitutive process.⁶⁷ However, where states allocate to private military

62. Private military contractors are not public entities, and are thus not subject to transparency requirements under the Administrative Procedure Act, such as the Freedom of Information Act. *See* Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000); The Freedom of Information Act, 5 U.S.C. § 552 (2000). *See generally*, Craig Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21 (1999).

63. The New Haven School's approach to international law, with its policy-oriented emphasis, holds that members of the entire global community clarify and implement their common interests through a process of authoritative and controlling decision-making. *See generally* McDougal & Reisman, *supra* note 59. This school greatly values human dignity—which it currently regards as a high level abstraction—and strongly desires to instigate a shift to a more specific approach to global respect for human dignity in international law. *See* Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1, 36-37 (1974). Professor Lasswell wrote, "A suggestive aid in moving from [human dignity, which is a] high-level abstraction toward specification is afforded by the Universal Declaration of Human Rights, which outlines some of the implications of human dignity." HAROLD D. LASSWELL, A PRE-VIEW OF POLICY SCIENCES 42 (1971).

64. U.S. Dep't of State, Bureau of Intelligence and Research, Fact Sheet, Independent States in the World, <http://www.state.gov/s/inr/rls/4250.htm> (last visited Apr. 29, 2008).

65. In their description of world power processes, Myres McDougal and Florentino Feliciano articulate that the primary basis of power is derived from nation-states and intergovernmental organizations. MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 13-14 (1961). Specifically, they state that "the other participant groups and entities[, such as individuals, intranational party movements, and private organizations,] frequently either act through the state or function as instrumentalities of state policy." *Id.* at 14. *See generally* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed. 1985).

66. *See generally* Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Process of Effective Power: The Global War System*, in POWER AND POLICY IN QUEST OF LAW 353 (Myres S. McDougal & W. Michael Reisman eds., 1985).

67. The New Haven School of Jurisprudence confronts the analytical traditions of jurisprudence previously espoused by positivists Austin, Kelsen, and Hart and their preoccupation with rules by focusing on process and context and further developing sociological approaches to law. *See generally* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 113, 56-59, 110-12 (Robert J. Beck et al. eds., 1996). The New Haven School uses the terms "constitutional" and

firms the power to wage war in exchange for money, as in the case of PMCs and PSCs, the constitutive process is effectively turned on its head. This results because the contextual map that is designed to clarify the interrelations of the social, power, and constitutive processes must perforce start with the idea that constitutional expectations are outcomes of social and power relations.⁶⁸ The map must also account for the untidy implications of arbitrary assignments of power to unaccountable non-state actors. Power is an outcome of social interaction, and a precise appreciation of power must take into account the contextual outcomes of social processes.⁶⁹

An unavoidable aspect of the world power process is that participants, resources, and demands fuel contestations for power. Mapping this process necessitates the identification of operative participants in the global, social, and power processes, in both the state and non-state contexts. It also requires the identification of participants' expectations, motivations, viewpoints, bases of power, and operational strategies, as well as the critical outcomes of politically conditioned action. Indeed, the process of effective power is the foundation on which institutions of authoritative decision-making exist.⁷⁰ The relationship between sovereign nation-states and non-state mercenaries is an important part of both the process and the outcome.

The constitutive process is related to the outcome of the power process in that the power process identifies the various participants in the world constitutive process (such as nation-states, non-state actors, non-governmental entities, international and regional

"constitutive" in distinctly different way than they are generally employed in jurisprudence. The School explains that the phrase, "constitutive process" is the "authoritative power exercised to provide an institutional framework for decision and to allocate indispensable functions." Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 257 (1967), *reprinted in* 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73, 77 (Richard A. Falk & Cyril E. Black eds., 1969). The outcomes of these "constitutive processes" are the "constitutive decisions." These "constitutive decisions" identify various authoritative community decision-makers, elucidate community policies, create bodies of authority, assign and authorize bases of decision-making power, and obtain the continuing performance of various kinds of decision-oriented functions that are necessary to formulate and administer general community policy. See LASSWELL & MCDUGAL, *supra* note 7, at 93 n.1. The approach stresses, among other things, a balanced emphasis between perspectives and operations, more precisely, between technically formal rules and operational practice. See *id.*

Professors McDougal, Reisman, Willard, and Lasswell offer three highly detailed approaches to policy-oriented jurisprudence. McDougal, Lasswell & Reisman, *supra*, at 254-55 (exploring the nature of policy-oriented jurisprudence in international law); Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988) (exploring the nature of policy-oriented jurisprudence in the world community); McDougal, Reisman & Willard, *supra* note 66 (exploring the nature of policy-oriented jurisprudence in world politics).

68. See McDougal, Reisman & Willard, *supra* note 66, at 376 ("[M]uch of the strategic use of bases in the world effective power process involves prepositioning and communication . . .").

69. See RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 112 (1977) (arguing that power is constantly produced by habitual practices that comprise social interactions because it "does not just passively exist as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not at all its own").

70. McDougal and Lasswell offer a configurative conception of jurisprudence that is the end result of an authoritative decision-making process. See LASSWELL & MCDUGAL, *supra* note 7, at 24-25. They argue that any policy-oriented problem has a scientifically-grounded answer that will promote the common interest in achieving a world order based on fundamental principles of human dignity. *Id.* at 34-38. Scholars and policymakers regard their approach to decision-making as a rigorous one embedded in a social context. *Id.*

institutions of governance, and the newly mighty individual as an emerging subject of international law).⁷¹ It also identifies their perspectives, operations, resources, bases of competence, strategies, and operational situations, as well as the outcomes and effects on world and public order.⁷² The world constitutive process is an outcome of the global system of effective power of conflict communication and collaboration, which traditionally constitutes and identifies the appropriate, authority-supported institutions of controlling decision-making in the global community.

However, PMCs and PSCs are not supported by traditional, appropriate sources of authority, even though national sovereigns are a key part of the process of assigning sovereign power to them.⁷³ In the case of PMCs and PSCs, the national constitutive

71. See generally Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725 (2007).

72. The key to the effective, collective achievement of international goals is the installation of a successful world constitutive process. See MCDUGAL & FELICIANO, *supra* note 65, at 62-63. The New Haven School compiled a list of variables designed to evaluate different systems of public order: (1) conceptions of law, a variable that views law through the lens of authority or control; (2) features of power processes protected by law, a variable that explores how law represents the command of the sovereign and how jurisdiction is divided among sovereign states; and (3) features of basic value processes protected by law, a variable that investigates the extent to which wealth, enlightenment, respect, well-being, skill, rectitude, and affection are protected. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 15-26 (1959), reprinted in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 113, 126-36 (Robert J. Beck et al. eds., 1996).

73. Contextual mapping may allow us to differentiate between permissible and impermissible delegations of competence by a sovereign. When a sovereign appropriately delegates competence, it is an exercise of authoritative power. Under the U.S. Constitution, "We the People" indicate our expectations for democratic governance and, by employing that celebrated marker of decision known as "voting," we delegate sovereign power to authoritative representatives. Our democratic governance is protected by constitutional safeguards, such as checks and balances, which prevent our branches of government from abusing their power or transferring their duties. Under Article II of the Constitution, the Executive is obliged to ensure that military power rests firmly in civilian hands. U.S. CONST. art. II, § 2; see also Reid v. Covert, 354 U.S. 1, 23-30 (1956) (discussing intent of Founders to keep "the military subordinate to civilian authority"). Article II further permits the Commander in Chief to delegate certain executive responsibilities only to an abbreviated list of "Officers of the United States," so long as the Commander in Chief continues to personally ensure that all "Laws be faithfully executed," under the auspices of the Constitution. U.S. CONST. art. II, § 3. The Constitution thus permits the Commander in Chief to delegate only to public officials. In other words, the Executive has no explicit constitutional authority to delegate competence to private actors.

It has been argued that the constitutional provision known as the "Marque and Reprisals Clause," which was designed to permit the U.S. government to take privateers into service, permits certain delegations to private actors. The Clause includes rigid safeguards against abuses and it is generally accepted that its text prohibits the Executive from unilaterally outsourcing any form of competency to private actors without the express consent of Congress. *Id.* art. I, § 8, cl. 11; see Matthew J. Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489, 1511 (1998) ("The Constitution . . . mandates congressional control over privately-financed military enterprises to ensure that the direct representatives of the people have a voice in all military policy."); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 695-96 (1972) (explaining different interpretations of the constitutional requirement of congressional approval of delegations under the Marque and Reprisals Clause). It is important to note that proceeding with a discussion of the applicability of the Marque and Reprisals Clause to the modern PMC/PSC debate may be untimely, since the Clause has long since been repudiated. David

M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1860 n.209 (1998) (“[T]he now obsolete power to grant letters of marque and reprisal might well be limited to a formal power to issue documents having a special significance in international law circa 1787 (that is, to save privateers from punishment as pirates under the law of nations).”); John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659, 720 (2002) (remarking on the obsolescence of the Marque and Reprisals Clause). *But see* C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954-58 (1997) (arguing that the Marque and Reprisals Clause, if read in a contemporary light, might permit the modern practice of devolving certain competencies to PMCs/PSCs).

Regardless of the applicability of the Clause, we have demonstrated that only certain forms of competency may be delegated, with or without congressional approval, because inappropriate delegations circumscribe, and therefore undermine, the process of authoritative decision articulated by, and answerable to, “We the People.” Indeed, the U.S. Constitution vindicates this argument; “We the People” have delegated certain inherently governmental powers to the Commander in Chief, who may not re-delegate them beyond the constraints of the Appointments Clause, and these powers may thus not devolve to private actors. *See* U.S. CONST. art. II, § 2, cl. 2 (granting the Commander in Chief the power to “appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States,” while granting Congress the power to “vest the Appointment of such inferior Officers”). This prohibition on re-delegation, otherwise known as the “Non-delegation Doctrine,” was excellently described by Locke:

The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.

JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 193 (Thomas I. Cook ed., Hafner Publ’g Co. 1947) (1690). This doctrine has been invoked variously in agency or fiduciary law. *See, e.g.,* *Shankland v. Mayor of Wash.*, 30 U.S. (5 Pet.) 390, 395 (1831) (“[T]he general rule of law is, that a delegated authority cannot be delegated.”); Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168 (1929).

The critical question under the Appointments Clause is: To whom the Executive may permissibly delegate certain competencies? The answer seems deceptively straightforward; the Commander in Chief may delegate appropriate competencies to officers of the United States who exercise “significant authority,” but not to “employees,” or “lesser functionaries.” *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The Commander in Chief may likewise delegate certain powers to certain officers of the United States under the Subdelegation Act, whose appointment requires the advice and consent of the Senate. 3 U.S.C. §§ 301-302 (2000). Both the Appointments Clause and the Subdelegation Act harmonize on the point that certain competencies may be devolved to “officers” of the United States. To follow this line of reasoning through, when a PMC or PSC is delegated a responsibility of “significant authority,” such as combat operations or prisoner interrogation, that is constitutionally reserved for “officers,” a term that includes the full range of confirmed military personnel from ensigns to generals, that delegation is unconstitutional because private actors are not officers. This is, of course, an extremely simplified rendition of the argument from a strict textualist reading of the Appointments Clause, and is without any explicit reference to how the Subdelegation Act tests whether certain delegations are consistent with the exercise of Executive authority.

It is also important to note that the debate concerning the permissibility of certain types of delegation is ongoing. It has been argued that it is possible to read the Appointments Clause loosely to permit the existence of a blend of delegates, including officers, authorities, and possibly others such as employees, so long as a constitutionally legitimate individual or body is accountable for any “significant

process of authoritative decision-making is thus not identical to the world constitutive process of authoritative decision-making. Here, the mapping process can provide a more precise and comprehensive set of conceptual markers. It allows an observer to pinpoint with greater accuracy the complex, dynamic interrelationships of the processes of both effective power and constituting authority throughout the various levels of social organization. In this map, outsourcing state power is a critically important element of this complex process. A central insight into the language of power in international law is that terms such as "internal" affairs, "domestic" jurisdiction, or "international concern," do not provide adequate conceptual markers to clearly signal the core interdependence of internal and external conditions that tie local phenomena to global concerns and vice versa.⁷⁴

The outsourcing of military conflict—arguably a particularly destructive consequence of globalization—can be viewed as an affront to sovereign power.⁷⁵ It is commonly held that the conditions that support "globalism," such as technological advances, the communications revolution, advances in business organization, political activism, terrorism, organized crime, and now heavily armed mercenary corporations, conspire to undermine territorial boundaries and permit the exchange of culture, political economy, and the growth of beneficent and malevolent global civil society.⁷⁶ However, this does not mean the demise of sovereign power; it means change. Sovereignty may indeed be strengthened as it changes to meet new needs and opportunities. In other ways, sovereignty may be limited in its capacity to deny international responsibilities and domestic obligations. Contextual mapping should

government power" that is wielded. See, e.g., *Weiss v. United States*, 510 U.S. 163, 191-94 (1994) (Souter, J., concurring). But see, e.g., *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. Off. Legal Counsel 124, 176 (1996) ("[L]egislation delegating federal authority to . . . private persons could undermine the executive branch's ability to carry out its functions."); *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249 (1989) (setting out the Clinton Administration's formal reasoning underlying its recognition that qui tam relators do, in fact, exercise "significant governmental power").

74. The terminology used to describe the notion that all nations are supreme within their own spheres but stand together as equals is shifting, presumably because of its flaws. See David Kennedy, *Theses about International Law Discourse*, 23 GER. Y.B. INT'L L. 353 (1980) (arguing that the division between legal theory and practice threatening legal scholarship is a manifestation of the contradiction that a state's sovereignty depends upon its participation in an international society incompatible with that sovereign authority).

75. See generally Winston P. Nagan, *Lawyer Roles, Identity, and Professional Responsibility in an Age of Globalism*, 13 FLA. J. INT'L L. 132, 132 (2001) ("Thus globalism is sometimes defined as a process which serves to erode traditional sovereign borders."); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1444, 1446 (1997) ("[T]he new conditions loosely associated under the platitudinous rubric of 'globalism' pose new and quite visible challenges to national sovereignty").

76. However, political scientist Stephen Krasner theorized that two issues, among others, are central to the broad conception of sovereignty: (1) Westphalian sovereignty, which excludes foreign actors from all domestic decision-making; and (2) interdependence, which speaks to State control over the cross-border movement of goods, services, and information. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 9-25 (1999). By examining the advent of globalism and the corresponding rise of NGOs, Krasner argues that sovereignty has long been frail as a legal principle because states ignore it whenever it suits their national interests, despite more contemporary efforts to balance the distribution of sovereign power between states and international organizations. *Id.*

help account for these complexities; it is a technique to more adequately improve our understanding of the conditions, consequences, and challenges of sovereign power in the world constitutive process.

An analysis of the world constitutive process will reveal the vast number of participants and institutions that comprise the global community.⁷⁷ Among these are state sovereigns, international and regional organizations, political parties, business groups, pressure groups, NGOs, non-state actors, and individuals in various roles relevant to social relations within and across state and national lines.⁷⁸ Among the important outcomes of the world constitutive process is the relatively specialized process of effective power, which involves connecting linkages between interaction and interdetermination operating in micro-social institutions; larger-scale social groups organized around common goals such as profit or influencing policy; broad-scale social formations such as the state; even larger aggregates of states; and a still larger and more complex world process of effective power. Again, a description of this process would focus on every feature of social organization that conditions, or is conditioned by, power.⁷⁹ This is illustrated by mapping the context of social process to the context of effective power.⁸⁰

The process of sovereign power, which in this Article refers to representative government, is characterized by patterns of communication concerning conflict and potential collaboration, which may function concurrently or sequentially among political contestants for power. As state power brokers engage in contestations for power, they generate understandings that recurrently involve communication that focuses on the limits and uses of sovereign power, either for collaboration and mutual interest or the facilitation of conflict and destruction. A fundamental aspect of constitutional law is that it institutionalizes expectations concerning the management of power in institutions of authoritative and controlling decision-making. Thus, outcomes of the social process itself include the development of mechanisms of social,

77. International law and sovereignty are two prominent elements of the decision-making processes of the world's many leaders and various other members of the global community. See generally Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999) (generally exploring how international law shapes the choices of decision-making parties).

78. McDougal, Lasswell, and Reisman use "about-law" categories to discuss the position of individuals and players within the scheme of the global constitutive process. McDougal, Lasswell & Reisman, *supra* note 67, at 261-75. They suggest that the individual can play an important role in world processes. *Id.* at 271-75. Specifically, both McDougal and Lasswell seem to bypass the internal and external sovereignty of nation-states by defining a "world social process" as that in which individuals participate directly. See McDougal & Lasswell, *supra* note 72, at 4-5. They suggest that rather than a world society (public order), a world community exists that is characterized by "interaction," which is a "matter of going and coming, of buying and selling, of looking and listening; and more." *Id.* at 7.

79. See generally ERIC BERNE, *GAMES PEOPLE PLAY: THE PSYCHOLOGY OF HUMAN RELATIONSHIPS* (1964) (discussing power "games" individuals play with each other in society).

80. The technique of mapping employs a series of concept markers, which may permit a description of the social and power processes, or any discreet aspect of it, and may permit levels of generality and particularity, depending upon the purpose of the inquiry. See generally McDougal, Reisman & Willard, *supra* note 67 (arguing that a more realistic conception of world order must incorporate a more comprehensive map of the global social process from which problems, especially violence, typically emerge).

cultural, and economic decision-making.⁸¹ Other particularly important outcomes of the social process are the decision-making capabilities created by and specialized for contestations for power. Examples of specialized outcomes of the power process are the interrelated phenomena of war and peace (or more generally, conflict and the management of conflict in the common interest).⁸² The understandings that emerge from these processes reflect the development, however imperfect, of cultural forms that seek to constrain excessive, destructive conflicts, to structure conflicts synergistically, and to innovatively create the capacity to improve law, culture, and political economy. However, from a practical point of view, the privatization of any aspect of combat operations is tantamount to the usurpation of conflict management and collaboration—critical roles of the sovereign—and circumscribes the basic political and juridical institutions of effective and authoritative decision-making.

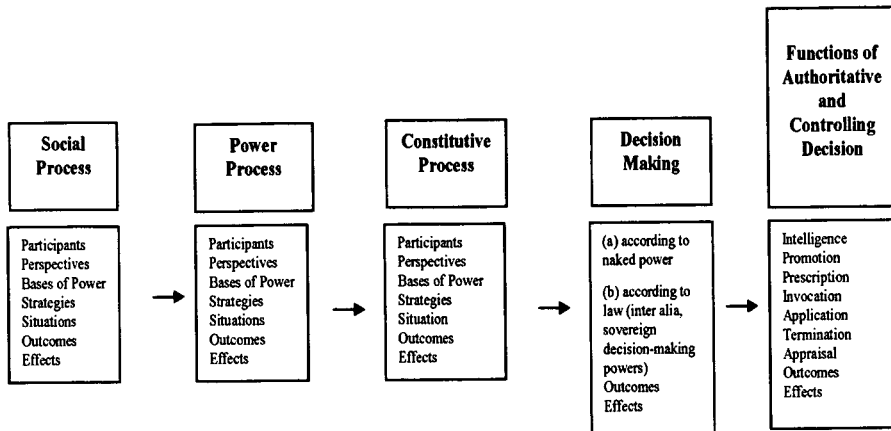
The traditional outcomes of the sovereign power process may generate practical frameworks of communication and collaboration with regard to basic human expectations, which seem to reveal an organic constitutional system where societal expectations of decision-making are inextricably connected to social organization, resulting in a practical arrangement that is explicitly or behaviorally constitutionalized.⁸³ From a practical point of view, the creation of a constitution can be triggered by an event or otherwise evolve out of certain cultural traditions. Events such as wars and international conflicts have stimulated the creation of constitutions, regional compacts, and multi-party understandings concerning power; restricted behavior; and imposed the possibility of sanctions. It is important to point out that it is not necessary for the norm-generating result of an event or cultural tradition to be a written constitution. In their seminal work, *The Cheyenne Way*, sociologists and jurisprudential scholars Karl Llewellyn and Adamson Hoebel recognized that a non-state body politic could establish unwritten “law ways,” or a living constitutional system capable of generating a system of law characterized by authority, prescription,

81. See LASSWELL & MCDUGAL, *supra* note 7, at 24-25.

82. The processes of political and legal decision-making, which characterizes the development of the European Economic Community and the European Political Union have already generated strong expectations, as well as conflicts about the development of a formal pan-European constitution. See Treaty Establishing a Constitution for Europe, art. I-1, Dec. 16, 2004, 2004 O.J. (C 310) 1 (stating that the European Constitution “[reflects] the will of the citizens and States of Europe to build a common future”). See generally GOVERNING EUROPE UNDER A CONSTITUTION: THE HARD ROAD FROM THE EUROPEAN TREATIES TO A EUROPEAN CONSTITUTIONAL TREATY (Herm.-Josef Blanke & Stelio Mangiameli eds., 2006). These developments include firmly-held expectations about the management of the institutions of peace and security in Europe, and are a complement to the insight of John Foster Dulles that global stability “depends most of all upon the existence of an adequate body of international law.” JOHN FOSTER DULLES, WAR OR PEACE 198 (1950). It is within this body of international law that exist various international regimes, which are “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983).

83. Eugen Ehrlich famously coined the phrase “*lebendes Recht*,” or “living law,” when he argued that jurists must learn and apply law as a mechanism of social conduct or custom, rather than that dictated by a sovereign or a treatise. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 496-98 (Walter L. Moll trans., Harv. Univ. Press 1936) (1913).

and control.⁸⁴ Accordingly, the complete map of the social, power, and constitutive processes might be represented as follows:⁸⁵



Let us now briefly examine contextual mapping as a tool in our newly clarified understanding of the sovereign power idea and the relevance of “context” for approaching how it works and its operational value, as well as its outcomes for regional, national, or world order. We understand that sovereign power refers to the allocation of fundamental decision-making competencies about the basic institutions of governance. It additionally refers to the recognition and authorization of persons or institutions competent to make the universe of governance decisions—from policy determinations, to economic decisions, to the waging of war and beyond—at various levels.

We understand that the immediate relevance of the social process context (i.e. the community in general) to the explanation of sovereign power is based on the observation that sovereign power and other important decision-conditioned outcomes are the results or products of social interaction.⁸⁶ A shorthand description of any social process context is one that involves human beings who pursue values (such as power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude) through

84. K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 273-89 (1941).

85. See HAROLD D. LASSWELL, *THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS* (1956); see also McDougal, Lasswell & Reisman, *supra* note 67, at 259-61.

86. The notion of “sovereign power” is a legal construct that expresses how social interaction is governed. Professor Michael Reisman argues that sovereign power legitimizes itself through the constitutive process, which involves “decisions about decision making.” W. Michael Reisman, *Law from the Policy Perspective*, in *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1, 8-10 (Myres S. McDougal & W. Michael Reisman eds., 1981). He evidently agrees with McDougal and Lasswell, who suggest that the “[a]uthority [of decision-making] is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures.” McDougal & Lasswell, *supra* note 72, at 9.

institutions that are supported by resources.⁸⁷ The contextual map outlined above provides conceptual markers that suggest contextually relevant questions about the identity of participants, their perspectives of identity, their claims and expectations, their bases of power, the situations within which they interact (institutional, geographic or territorial, temporal, or solely in instances of crisis), the strategies of action they might or might not use (diplomatic, military, economic, or propaganda), and the relevant outcomes and effects.⁸⁸

One of the most important outcomes of the social process background is the generation of perspectives and operations specialized to power relationships in society.⁸⁹ This too may be expressed in general terms; power-conditioned human beings pursue power values through institutions based on resources. In short, in any social process—at any level—there are human beings who identify with power, claim it, or defend expectations about it. Thus, we might refer to the power process as a relatively specialized outcome of social interaction.⁹⁰

87. See McDougal & Lasswell, *supra* note 72, at 7. (suggesting that all individuals seek to achieve the fulfillment of the following eight values: power, wealth, respect, well-being, skills, enlightenment, rectitude, and affection).

88. Professor Reisman has also employed a slightly similar checklist, which integrates inquiry into relevant legal policies and authority for contextual inquiries to determine outcomes by exploring “who is using [a] strategy, for what purpose and in conformity with what international norm, with what authority, decided by what procedures, where and how, with what commensuration to the precipitating event, with what degree of discrimination in targeting, . . . and what peripheral effects on general political and economic processes.” W. Michael Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision*, 71 AM. SOC’Y INT’L L. PROC. 182, 184 (1977); see also W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 836-58 (1971) (outlining criteria for assessing lawlessness). For more detail regarding phase analysis, see, for example, Harold D. Lasswell & Myres McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 386-88 (1971); John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 668-71 (1968); Suzuki, *supra* note 63, at 22-28.

89. See Myres S. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 133, 137 (1953), quoting Roscoe Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73, 89 (1932) (suggesting that power relationships in international law are social ends, the legal order of which are “process[es] and not . . . condition[s]”). Tacit in Eurocentric concepts of sovereign power is the principle that it is the supreme—though not necessarily absolute—power of a State’s controlling body to render and enforce decisions; accordingly, power relationships are inextricably linked to the existence of sovereignty. See generally Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada’s Native Indians*, in THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 333, 335 (Menno Boldt & J. Anthony Long eds., 1985).

90. Locke and Rousseau believed that sovereign power stems from the absolute authority derived from a voluntary agreement of the independent wills of individual members of society, who collectively delegate their authority to the sovereign government. Locke presumed that these citizens voluntarily entered into such a social pact to obey the government because governments are merely the “agents and trustees of the people.” LOCKE, *supra* note 73, at 121-247 (discussing the “social contract” that exists between the sovereign and the people); see also THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). To Rousseau, sovereign power also functions as a social compact. Specifically, Rousseau held that “the act of association includes a reciprocal commitment between the public and private individuals, and that each individual, contracting, as it were, with himself, finds himself under a twofold commitment: namely as a member of the sovereign to private individuals, and as a member of the state, toward the sovereign.” JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT; DISCOURSE ON THE ORIGIN OF INEQUALITY; DISCOURSE ON POLITICAL ECONOMY 25 (Donald A. Cress trans., Hackett Publishing Co. 1983) (1792).

The process of effective power might be more carefully assayed using the conceptual markers indicated in the phase analysis above. The resulting outcomes indicate the processes of actual control or power that are rooted in political and juridical institutions of effective and authoritative decision-making. This process becomes controverted when the management of a conflict instigated by one state against another is delegated to a private actor. The contestation for power between the two states might be conventional warfare, an unconventional insurgency, a violent rebellion, a revolution, or another hostile confrontation. If the state that eventually wins (or otherwise seeks to "constitute" or institutionalize its authority) outsources a combat role to a PMC or PSC, this state is thus seeking to stabilize its power basis on hollow formulations about the "authoritative" and "controlling" aspects of power. While in the case of hegemonic warfare, it is conceivable that victor states might encounter less difficulty as they seek to stabilize their claims and expectations, non-hegemons might encounter significant difficulty in constituting effective control over the population, territory, instruments of internal governance, and external recognition that collectively comprise the conceptual markers that indicate the existence of sovereign power.

There is much truth in the insight of the legal realist Karl Llewellyn that the idea of a constitution is tied to the idea of an institution.⁹¹ As indicated, the constitutive process is an outcome of the world process of effective power and is continuous in its communication and collaboration to constitute and reconstitute authority.⁹² The constitutive process does not render irrelevant the similarly continuing process of conflict, especially regarding access to, and the establishment of, specific, contextual uses of power. There is an obvious necessity that a contestation for power be predicated on the efficacy of constituting and stabilizing it. Communication concerning conflict management and the establishment and maintenance of basic institutions of effective, authoritative decision-making is thus a prominent feature of the constitutive process. From the point of view of legal theory, the contextual mapping method permits us to systematically examine the conditions of sovereign power, as well as its consequences for social organization.

The constitutive process thus involves human beings who, in roles specialized to the institutions of power that claim and constitute the system of authority in society, pursue constitutive authority as a value. The above phase analysis, with its methodological, conceptual markers, gives us a sense of the comprehensive nature of this process and offers us prospective guidance so that we can understand it with more

91. See K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

92. From the perspective of the New Haven School, international lawmaking or prescription is seen as a process of communication involving the communicator and the target audience. This involves the communication of symbols of policy content, symbols of authority, and symbols of controlling intention. W. Michael Reisman, *International Lawmaking: A Process of Communication*, Address at The Harold D. Lasswell Memorial Lecture (Apr. 24, 1981), in 75 AM. SOC'Y INT'L PROC. 101, 108 (1981). That is to say, members of the school discuss three aspects of prescriptive communication. These aspects essentially convey legal norms because they designate policy that emanates from a source of authority, and create an expectation in the target audience that the policy content of the communication is intended to control. See McDougal, Lasswell & Reisman, *supra* note 67, at 423-26. These three signals are: (1) the "policy content," which is the prescription, (2) the "authority signal," which is the legitimate basis from which to prescribe, and (3) the "control intention," which is the enforcement power. *Id.* at 423.

particularity. The broad outline of the theoretical nature of the contextual method, especially contextual mapping, may provide a useful bridge between the different disciplines and cultural contexts in which the term "sovereign power" is used, often abused, and certainly misunderstood.

IV. UNPACKING THE CONTEXTUAL MAPPING PROCESS: THE THREAT POSED BY PRIVATE MILITARY ACTORS

Arguments advocating and condemning the use of PMCs and PSCs abound; we do not wish to add substantially to them. Rather, we are interested in whether the use of PMCs and PSCs in state-instigated warfare is theoretically legitimate. The legitimacy of a usurping regime is a meta-legal question that implicates political and moral considerations and thus belongs to the province of legal theory.

The appeal of PMCs and PSCs is obvious. In the United States, the Executive's conventional military discretion is not reflexive. Instead, it is subject to a spectrum of political, legal, and regulatory constraints, particularly where possible warfare is concerned. However, voters' disdain for military conflict,⁹³ congressional opposition to military engagement,⁹⁴ international law restraints on the use of force,⁹⁵ and other limitations on executive power might be circumvented by contracting private operators to pursue American military objectives. An additional incentive for an unscrupulous government authority to take advantage of this loophole is that private contractors are not held to the same legal standards as the American military machine, particularly the Uniform Code of Military Justice, nor are their actions completely suggestive of official U.S. acquiescence. Despite the numerous similarities, a key point of divergence between the U.S. armed forces and PMCs and PSCs is that the latter are

93. For example, a July 2007 Gallup poll showed "public opposition to the war is at its highest point thus far," and found that 62% of Americans thought the U.S. "made a mistake in sending troops to Iraq." This was the first time the Gallup poll revealed opposition to the war over 60%. Jeffrey M. Jones, *Latest Poll Shows High Point in Opposition to Iraq War*, GALLUP NEWS SERVICE, July 11, 2007, <http://www.galluppoll.com/content/?ci=28099>.

94. In February 2005, Senator Jack Reed wrote a letter to then Secretary of Defense Donald Rumsfeld, objecting to the combat responsibilities entrusted to private contractors. He wrote:

These security contractors are armed and operate in a fashion that is hard to distinguish from military forces, especially special operations forces. However, these private security companies are not under military control and are not subject to the rules that guide the conduct of American military personnel. . . . It would be a dangerous precedent if the United States allowed the presence of private armies operating outside the control of governmental authority and beholden only to those who pay them.

Press Release, Sen. Jack Reed, *supra* note 30. Reed's letter was co-signed by twelve other senators, including Ted Kennedy, Harry Reid, Carl Levin, Jay Rockefeller, and Tom Daschle. *Id.*

95. Customary international law requires states to refrain from using force, as well as threatening to use force. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27). However, Article 51 of the United Nations Charter grants states the right to employ self-defense in response to the threat or use of force in circumstances that legally constitute an "armed attack." U.N. Charter art. 51. The International Court of Justice has narrowly interpreted the phrase "armed attack." Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. at 103. Debate continues as to whether the right to self-defense includes preventative or anticipatory strikes. See IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78 (1963) (rejecting various arguments advancing the position that Article 51 permits anticipatory self-defense); see also Nagan & Hammer, *supra* note 44, at 382-85 (discussing whether national security doctrine formulated to protect the state from threats such as terrorism can be constrained by law).

motivated to fight by profit and are subject to loose regulations contained in a contract; they do not bear the emblematic imprimatur of the Executive. This arrangement severs the chain of command at an apparently low point in the ostensible hierarchy. Government officials can register ex post facto denials of knowledge of PMC and PSC activities, even where military objectives were messily achieved, and contraventions of the law by these contracted agents can be spun to reflect poorly on the proprietary firms rather than on the contracting party.

There are, of course, other ways to conceptualize the problem of PMCs and PSCs. One way is to view the use of PMCs and PSCs as a strategy that is completely antithetical to responsible governance and the rule of law. Under this view, PMCs and PSCs functionally assault the outcomes of stability and security that characterize contemporary world order. In this situation, the Executive's motivations to contract with private military firms might be sinister, such as deliberately circumventing congressional advice and consent. Other points of view might be that the Executive looks to PMCs and PSCs for economic reasons, such as undercutting the cost of a protracted military engagement by hiring the lowest bidder, or for political reasons based on an aversion to risking the lives of enlisted American men and women.⁹⁶ Also, democratic states typically resist instituting compulsory military service; the resultant reduction in enlistees may suggest that outsourcing certain military functions is a feasible way to close the gap between available manpower and the manpower needed to form an effective force.⁹⁷ Wading through these perspectives, be they either intellectually justifiable or a miasma of devious motivations, is an unenviable task. However, contextual mapping has permitted us to account for these perspectives, particularly threats to the constitutive process, in a far more explicit way than other approaches, and demonstrates that a state's hiring of PMCs and PSCs for use in any form of combat operations controverts the process of effective power.

If a PMC or PSC cannot exercise effective power because "victory" through mercenary force is no victory at all, then the actions of a PMC or PSC cannot constitute authority, even when acting as a proxy for a state. Political economist and sociologist Max Weber offered the following commentary on what constitutes a legitimate use of force:

Today . . . we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory. Note that "territory" is one of the characteristics of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.⁹⁸

96. S. Goddard, *The Private Military Company: A Legitimate International Entity within Modern Conflict* 4 (2001) (unpublished M.M.A.S. thesis, U.S. Army Command and General Staff College), available at <http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf> (stating that in recent years, Western powers, in particular the United States, have for political reasons become reticent to risk their military forces in engagements designed to quell regional conflicts or solve humanitarian crises after eighteen U.S. soldiers were killed and seventy-three were wounded in Mogadishu on October 3, 1993 as part of the failed U.N. mission in Somalia).

97. See Witte, *supra* note 9 ("The Pentagon has estimated that there are 100,000 government contractors operating in Iraq, doing such jobs as serving meals, guarding convoys and interrogating prisoners.").

98. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

In other words, the constitutive process demonstrates that effective power can only be exercised by political and juridical institutions of effective and authoritative decision-making, particularly concerning the use of so-called legitimate force. Hans Kelsen likewise argued that collective security necessitates that the state exercise a monopoly on the legitimate use of force.⁹⁹ In short, the validity and legitimacy of a use of force cannot be gauged by the success of the act itself,¹⁰⁰ particularly when it is achieved by a proxy for the state.

Contextual mapping of sovereign power reveals a formal juridical concept of what comprises a legitimate use of force. The use of mercenary forces in military combat sidesteps the social, political, and moral dimensions of the question of legitimacy, and fails to provide the critical distinction between force and law. Granting blanket validity to a usurpatory act based on its efficacy is impracticable; it undermines the rule of law, collapses constitutional governance, and promotes political instability.

V. CONCLUSION

During the Cold War, the global constitutional system, however imperfect the arrangement, included the effective power understandings of superpowers in a bipolar world. Following the demise of Soviet communism, the power underlying the global constitutional system effectually became uni-polar and the structure and process of global power was thereafter insufficiently tailored to balance the emergence of private and independent armies, such as PMCs, PSCs, international criminal cartels, terrorist groups, and other types of organized groups that challenge the fundamental values of world order.

99. HANS KELSEN, *PURE THEORY OF LAW* 37-38 (Max Knight trans., 1967).

100. Indeed, even if it is possible to interpret certain PMC/PSC interventions as momentarily successful, it is still not a sufficient justification for the intervention itself. This understanding, that the “ends” brought about by PMC/PSC interventions never justify the “means,” calls to mind Vattel’s Law, which holds that certain belligerent behavior by a state surpasses the scope of its justness and strips even a just cause of its rectitude. See Albert de Lapradelle, *Introduction* to E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, at xxi-xxiii (Charles G. Fenwick trans., The Legal Classics Library 1993) (1758). Vattel regarded warfare as a right reserved solely for the state “as a remedy against injustice,” when peace could not be obtained in any other way. *Id.* at 254. Vattel might agree that a private actor could never serve as a combat proxy for a state.

Since PMC/PSC involvement in combat operation controverts the political and juridical institutions of effective and authoritative decision-making, even PMC/PSC interventions with arguably favorable, if temporary, results are nevertheless illegitimate delegations of sovereign competency. See Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 94-98 (1998) (explaining that the private military firm Executive Outcomes (EO) fought on behalf of government authorities in Angola and Sierra Leone in the mid-1990s to quell insurrections. Despite having “devastating effects” on civil wars, EO “proved crucial in forcing the rebel movements in each country to negotiate respective settlements and in restoring social order”). We are reminded of other PMC/PSC interventions that, operating under the same regulatory and accountability lacuna as the possibly successful interventions, still haunt U.S. foreign policy and claims to moral authority, such as the events at Abu Ghraib. See Valerie C. Charles, *Hired Guns and Higher Law: A Tortured Expansion of the Military Contractor Defense*, 14 CARDOZO J. INT’L & COMP. L. 593, 595-96 (2006) (discussing allegations of PMC involvement in the 2004 torture of prisoners at the Abu Ghraib prison camp in Iraq).

Contextual mapping of privatized military actors, along with a discriminating appraisal of the institution, have revealed that deregulation of both security and political economy weaken the state by weakening the core values of the community and the foundational principles of good governance and democracy. We earlier indicated that while this weakening may not be readily apparent in hegemonic states, in non-hegemonic nations, such as African states, any allocation to the private sector of competences traditionally reserved to states under the banner of sovereign power, such as the use of force and military coercion, may thwart attempts to promote national viability and sustainability. Indeed, PMCs and PSCs can undermine the constitutional order and territorial integrity of a state even where their activities are not intended to yield these effects. In short, they destabilize state security by eliminating any measure of predictability as it relates to national security and therefore the state's ability to manage threats. Proxy "victories," achieved by private actors, de-legitimize any subsequent constituting authority because the use of force by private actors controverts the constitutive process.

When a state's security apparatus is sacrificed to private industry, it reveals that the concept of sovereign power is undergoing some degree of change. The practical effect of this change is that claims, previously reserved to states, of what comprises permissible or acceptable exercises of power in the international environment are effectively up for grabs. Thus, embedded in the constitutive system, which is universally regarded to be a norm-generating setting that establishes the efficacy of the international community's living law, is a fundamental flaw that permits non-state actors or mercenaries to enjoy the trappings of sovereign power. This flaw renders various sources of international law, such as the U.N. Charter and other instruments, which are predicated on the assumption that only sovereigns wield sovereign power, moot at best, or, at worst, obsolete. The implications are apparent; while extreme concentrations of power in the state might yield state domination without regard to law, extreme concentrations of power in the private sector, particularly private military actors, might yield exercises of power outside of the law, and thus erode the efficacy of, and respect for, the law itself. The international system is thus precariously situated at the precipice of an extremely slippery slope. It is now critical to defend the values embodied in the U.N. Charter. Perhaps this even requires reforming the Charter itself, so that it might more effectively meet contemporary challenges to the world constitutive process, particularly the challenges posed by those forces that are pressuring the international system to adapt to the ongoing reorganization of the distribution and regulation of sovereign power. In this age of increasing global complexity, it is infinitely preferable that power be constrained by law rather than brute force.

We have demonstrated that the term "sovereign power" cannot be separated from the core concept of legitimate authority. To some extent, this demonstration yields new ambiguity reposing in the limits of meaning that we attach to terms and phrases. We have sought to ameliorate this ambiguity by narrowing the context of the terms "sovereignty," "power," and "authority" to the inefficacy of private military actors. Sovereign power is thus dynamic because of its deliberate emphasis of inquiry on policy and decision. In the arena of PMCs and PSCs, the meaning of "sovereign power" must be unpacked in terms of its concrete operations in the world social process, which provides a framework for inquiry that yields better understandings of the relationship between sovereign power and the global process of constitutive

decision-making. This clarification may still be further understood by using contextual mapping, a method developed by the New Haven School of Jurisprudence. Using this analytical framework, we approach the fundamental character of “sovereign power” from a different angle: through the lens of the global constitutional process, we simultaneously shed further light on ostensibly appropriate and inappropriate ways to claim or use sovereign power under current world order conditions.